

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DENNIS K. SUDBERRY,

Petitioner,

vs.

ISIDRO BACA, *et al.*,

Respondents.

Case No. 3:14-cv-00663-HDM-VPC

ORDER

This action is *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner.

This Court has conducted a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The Court must dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” Rule 4 of the Rules Governing Section 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990).

A federal court may only grant a petition for writ of habeas corpus if the petitioner can show that “he is in custody in violation of the Constitution” 28 U.S.C. § 2254(a). “According to traditional interpretation, the writ of habeas corpus is limited to attacks upon the legality or duration of confinement.” *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484-86 (1973)). The instant petition does not attack the legality or duration of

1 petitioner's confinement. Rather, the petition challenges petitioner's conditions of confinement
2 while incarcerated in prison. Petitioner alleges that he was injured by another inmate because prison
3 staff failed to protect him, in violation of his Eighth Amendment rights. Petitioner seeks monetary
4 relief from prison officials. Thus, his claims are not appropriate for habeas corpus relief.
5 Challenges to the conditions of confinement are more appropriately raised in a civil rights action
6 filed pursuant to 42 U.S.C. § 1983. *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991); *Crawford*
7 *v. Bell*, 599 F.2d at 891-92.

8 District courts are required to rule on the certificate of appealability in the order disposing of
9 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and
10 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with any appeal,
11 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th
12 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v.*
13 *Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial
14 showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28
15 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must
16 demonstrate that reasonable jurists would find the district court's assessment of the constitutional
17 claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
18 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of
19 reason; that a court could resolve the issues differently; or that the questions are adequate to deserve
20 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court's
21 dismissal of the petition debatable or wrong. The Court therefore denies petitioner a certificate of
22 appealability.

23 **IT IS THEREFORE ORDERED** that this action is **DISMISSED** for failure to state a
24 cognizable habeas corpus claim. The dismissal is without prejudice to petitioner raising his claims
25 in a civil rights action pursuant to 42 U.S.C. § 1983, filed in a new case.

26 **IT FURTHER IS ORDERED** that the Clerk of the Court shall send petitioner two copies
27 of an *in forma pauperis* application form for a prisoner, one copy of the instructions for same, two
28 copies of a blank 42 U.S.C. § 1983 prisoner civil rights form, and one copy of instructions for the

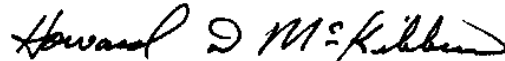
1 same. The Clerk shall also send petitioner a copy of the petition and all documents submitted in this
2 action, at ECF No. 1.

3 **IT IS FURTHER ORDERED** that petitioner may file a civil rights complaint and *in forma*
4 *pauperis* application in a new action, but he may not file further documents in this action.

5 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
6 **APPEALABILITY.**

7 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly.

8 Dated this 30th day of December, 2014.
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11 UNITED STATES DISTRICT JUDGE
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